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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 585

RALPH RICHARDSON, Petitioner,

C C BRUNNER, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

REPLY BRIEF FOR PETITIONER

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Louisville, Kentucky,

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ROBERT HUBBARD.

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REPLY BRIEF OF PETITIONER IN TWO PARTS

PART I

DETAILED REPLY TO STATEMENTS AND ARGUMENTS IN RESPONDENT'S RESPONSE pp. 1-5

Reply to "Historical Statement"

Respondent, p. 1, says:

"They also charge that counsel for C. C. Brunner made misleading statements to the petitioner, but upon examination of the record in the case we find that the petitioner was not ignorant, poverty stricken or misguided, but a

selfish imposing individual, who thought only of himself * * * ."

On pp. 2, 3, 4, 5, he says:

"He received additional tax bills for the years 1951 and 1952 but he still failed to pay his taxes or redeem his property but collected his rents and permitted this respondent to pay his taxes for the additional two years, during which period he had the privilege of paying the delinquent taxes with interest and penalties, but still he elected to let this respondent pay the tax while he collected the rent and spent it for his own use and benefit.

"For further evidence of the insincerity of petitioner's claim that he was prevented from paying his tax, and redeeming his property by the exorbitant price and strict demands of the respondent's counsel, and that he attempted to pay his taxes before expiration of redemption period, and that he was denied due process of law, falls that because he would not have had to come to respondent if he had sought in good faith to redeem his property within the time allowed by law; for that is done in the office of the Tax Receiver and the purchaser has no choice in the matter, but to receive his refund plus interest and penalties."

Then he quotes KRS 91.510 and continues:

"This the taxpayer, Ralph Richardson, the petitioner herein, neglected to do; thus the Court can readily see from the law herein that the petitioner is not sincere when he claims that he was prevented by the exorbitant demands of counsel for respondent, from redeeming his property within the time allowed by law, thereby denying

him due process thereof."

"Petitioner states in his petition, page 11, second paragraph, clause (2) 'That petitioner tried to redeem his property within the time allowed by law and before his property was conveyed by City Tax Deed.' This effort certainly was not in good faith, if it had been petitioner would have been able to redeem the same and Brunner, the respondent, would not have had any choice in the matter, and the Tax Receiver would not have executed the deed to C. C. Brunner."

Petitioner's Reply To The Above Statements

In his uncontradicted affidavits, among other things, petitioner says:

"VI. That affiant approached the representative or attorneys for the Plaintiff on several occasions and was unable to deal with them because they wanted more than the taxes, interest and penalties; and that on one occasion he offered to redeem—within the time allowed for redemption, as he now recalls—his property from tax sale by offering the Plaintiff's representatives $1,000.00 and to pay the difference on the balance in monthly payments, and that this offer was more, far more, than the amount of taxes, interest and penalties then due; . . ."

R. p. 32

and,

". . . That Mr. Gathright told him that he was washed out, that Mr. Brunner owned the fee

simple title and that this affiant did not have any interest in it, and that if he wanted to buy the property back he would have to get $7,035.00 cash on the line, that it would not be accepted in payments. * * * "

"When he had conversations with Mr. Brunner's attorney in the summer of 1955, Mr. Brunner's attorney did not inform him of his rights. Mr. Brunner's attorney did not tell him that the deed were void ab initio. Mr. Brunner's attorney did not tell him that the Tax Receiver violated the statute in selling more real estate than was necessary. Mr. Brunner's attorney did not tell him that it was the Tax Receiver's duty to distrain and sell his personal property first. In short, Mr. Brunner's attorney did not inform him of any of his rights, but concealed all of his rights from him." R., p. 107.

In *Crescent Grocery Company* vs. *Vick*, 240 S. W. 388, 194 Ky. 727, at p. 729, the Court of Appeals of Kentucky said:

"Actionable fraud may consist as well of suppression or concealment of material facts as in the assertion of what is false, for the gist of the action is the production of a false impression upon the mind of the party misled to his injury."

For many opinions, not only from Kentucky but from practically every state in the union, and from this Court, to the same effect, see Sec. 78 p. 851 of Vol. 23 *Am. Jur.* From Petitioner's uncontradicted affidavits, which respondent didn't even attempt to deny, it is readily seen that the respondent not only misrepresented material facts, namely, that the respondent was the owner of the property and that the

petitioner was washed out, but concealed from the petitioner his rights under KRS 91.510 and concealed from him other material rights which they knew he had.

Respondent was and is most generous. He and his counsel were and are shining examples of generosity. Respondent generously, yes, very generously, paid petitioner's city taxes. Then, when he had paid less than $1,000.00 in taxes, he and his counsel were so magnanimously generous, and indeed amazingly so, that they demanded $7,035.00 "cash on the line" to let him have his property back. Wonderful, oh wonderful generosity!

Respondent and his counsel were and are paragons of the very brilliant essence of unselfishness. Why, when respondent had paid less than $1,000.00 in taxes on petitioner's property, he and his counsel were so incredulously—indeed unbelievably so—unselfish that they demanded of petitioner "cash on the line" more than seven times what respondent had been out. They were so free from selfishness that they were unwilling to inform petitioner of his rights under KRS 91.510, namely, that he could go to the Tax Receiver, pay his taxes, interest and penalties, and have his property free from respondent's claims. Oh, wonderful, amazingly wonderful unselfishness of respondent and his counsel!

Sincerity—good faith—doubtless respondent and his counsel are the very essence, the very brilliance, of sincerity and good faith. Why, they even told the petitioner that he was washed out, that the respondent

owned the property, that the petitioner had no interest in it. Oh, oh! So sincere! They doubtless knew that he was illiterate and did not know his rights. Hence they—oh sure, sure indeed—in sincerity and good faith (because of their unselfishness) concealed from—did not mention to—petitioner his rights under KRS 91.510 upon which they now so glibly rely.

Rents—Neglect—Diligency—Petitioner's uncontradicted affidavits, R. pp. 18-20, R. p. 52-53, R. p. 107, show (1) that he diligently tried to settle with respondent, but respondent's demands were so exorbitant that he not only could not meet them, but could not employ counsel to advise and assist him. Respondent was very diligent in demanding far more than he was entitled to and out of petitioner's rents. R. p. 93-94, 98-100, 102.

On p. 2 of his Response, he says:

> "* * * yet he permitted his tax bills to accumulate and to become delinquent for the year 1950, at which times his property was duly advertised for sale pursuant to law in the daily papers and posted in the City Hall as required by Statute.
>
> "He failed to appear and pay his tax in due time and at the time and place designated in the notice of sale a tax bill for the year 1950, his tax bill against the property herein, was sold to the respondent C. C. Brunner."

Then, on p. 4 of his Response, he says:

> "This petitioner had plenty of time to redeem his property if he had not slept upon his rights to redeem before Judgment. * * *."

Reply

There is no proof by pleading, affidavit, or otherwise, in this (said statements are mere unsupported assertions) record that petitioner's property was "duly advertised * * * as required by Statute." Indeed petitioner sought for discovery purposes to take proof on these various points and on other matters, but respondent objected (no doubt in sincerity and in good faith) and the Court, erroneously as we very earnestly maintain, sustained respondent's objection. R. pp. 29-32. Your petitioner sought to take depositions of the City Tax Receiver and of the respondent to discover whether or not in the sale of petitioner's property for city taxes the Tax Receiver had complied with KRS 91.470 and KRS 91.480 (1) and (2). Your petitioner wanted to know whether the Tax Receiver had under KRS 91.470 made any attempt whatever to destrain his, petitioner's, personal property for taxes. Petitioner wanted to know under KRS 91.480 why the Tax Receiver had sold three pieces of real property when the sale of one would have been more than sufficient to pay the taxes on all three. Your petitioner wanted to know whether the Tax Receiver had held a public auction or whether or not he had just sat around the table with a few cronies and let them select the properties that they wanted to buy. Your petitioner wanted to know whether the Tax Receiver had complied in all respects in the sale of his property that are required by KRS 91.470 and 91.480 (1) and (2)

We sincerely (or does sincerity and good faith rest only in respondent and his counsel?) maintain that the petitioner was entitled to take proof on these points and that the Court erred in declining to let him take it. It is very significant, we maintain, that the respondent not only prevented the petitioner from taking such proof, but failed and refused to give any such proof either in affidavit form or otherwise. It seems to us that the respondent wanted to suppress very vital information.

Petitioner did not sleep on his rights. In due time, yes, ample time, he undertook to settle with respondent and redeem his property long before suit was filed, yes, within the time specified for the redemption of his property. But, oh, unfortunately, how unfortunate, indeed, he went to the wrong parties, namely, respondent and his counsel, who concealed from him his rights and demanded exorbitant amounts from him.

Respondent, p. 4, says:

> "After suit was filed and defendant having been duly served * * * ."
>
> " * * * counsel for plaintiff filed several pleadings in the case and mailed copies to the defendant with full postage affixed thereto and none were returned, but still no defense was made by the defendant or any settlement attempted although suit was filed and service made. Finally after several days of delay counsel for plaintiff, C. C. Brunner filed motion for judgment and mailed copy postage paid, to defendant and upon the failure of defendant to answer, judgment was

rendered in favor of plaintiff, C. C. Brunner on October 22, 1956. See Petitioner's petition, Appendix V."

In reply to this, we wish to state that the record discloses ONLY ONE pleading, namely a notice to refer the case to the Commissioner—R. pp. 12 and 13—was ever mailed to petitioner. There is no claim that the complaint was mailed to him.

Respondent, p. 5, says:

> "This judgment is a regular valid judgment, entered properly under the law and is not void *'ab initio'* as contentended by the petitioner."

In reply to this statement the petitioner has never claimed that the default judgment was or is void *ab initio*, but he has and still does most earnestly contend that the City Tax Receiver's deed of petitioner's property to respondent was and is void *ab initio*. See "D," pp. 18-20 of his petition. Petitioner did claim, and still most earnestly maintains, that the default judgment is and was void; that he had a right to move the Court at any time to set it aside; that it conveyed no rights or interest whatever in respondent to petitioner's property involved herein; and that, therefore, it took petitioner's property without due process of law. See "A," "B," "C," "D," "E," "F," "G," and "H," pp. 16-26 of Petition.

Respondent on page 5 says:

> "The only question here is whether or not the judgment is authorized by statutory provisions."

That is not the question involved in petitioner's petition except only as it affects the constitutional valid-

ity of KRS 91.540. One and only one question is presented in his petition. It is, has petitioner's property been taken without due process of law? This question has a two-fold aspect, first, is not the taking of property under void judgment taking it without due process of law; second, is not KRS 91.540 in violation of both Kentucky and United States constitutions in that it takes property without due process of law? See "II," pp. 23-26 of Petition, and Part II of this brief, pp. 27-32.

Reply to "Chapter 91 of the Kentucky Revised Statutes" and to "Constitutionality Not Questioned," pp. 6 and 7 of His Response and to Other Similar Statements in His Response.

Respondent, on p. 6, says:

> "The validity of these statutes has never been questioned."

On p. 7 he says:

> "The constitutionality of this law has never been attacked by the taxpayer, and now stands within the Statutes inviolate."

On p. 8 he says:

> "Respondent insists that no constitutional questions have been raised in this Court and, especially in the Court below."

On p. 10 he says:

> "KRS 91.480 and 91.540 are valid statutes the Commonwealth and have never been questioned or attacked by this petitioner or anyone else as to their constitutionality and for this and

other valid reasons, respondent contends that this Court has no jurisdiction * * * ."

On p. 11 he says:

"The Supreme Court has no jurisdiction where alleged unconstitutionality was not raised below."

Again, on p. 11 he says:

"Petitioner has not raised any constitutional question, * * * ," etc.

On p. 16 he says:

"The validity of the statute that governs this petition is not before the Court and was not before the Trial Court below."

On page 34 of his response he says:

"The petitioner sets out in his petition from pages 15 to 33 inclusive the questions which he seeks to have reviewed. It seems that he is premature in seeking a review of the questions therein as he has not exhausted his rights under the state laws, through the various State Courts of the state.

"If this Statute is arbitrary or repugnant to the Constitution the test should be made under the State laws, before the Supreme Court should be called upon to rule upon a question that has not been tried in the State Courts." * * *

If the default judgment was and is not void as we earnestly contend that it is because the Court below had no jurisdiction over the subject matter (see "E," "F," and "G," pp. 20-23 of Petition) and, therefore, did not invest in the respondent any rights whatsoever

in the property involved, and, therefore, took petitioner's property without due process of law contrary to both Kentucky and Federal constitutions. Petitioner would not now be seeking redress in this Court. Petitioner raised this question in the Court below. In the Court below petitioner most certainly insisted and contended that KRS 91.540 is unconstitutional and contrary to both the Kentucky Constitution and the Constitution of the United States, see "II." Petition, pp. 22-26 and Appendix VI a. and Appendix VI b. pp. 52-56 of his Petition. If petitioner had not raised these questions in the Court below, he would not now be seeking redress in this Court. Certainly petitioner has raised these questions and they are now before this Court.

On p. 7 of his Response, respondent quotes from the opinion of *Johnson, Governor, Commonwealth, ex rel Meredith, Attorney General*, 291 Ky. 829, 165 S.W. 2d 820. From that quoted by the respondent, we requote the following:

> "* * * Section 26 of the Constitution declares that all laws 'Contrary to this Constitution shall be void.' Our functions are to determine the constitutional validity and to declare the meaning of what the legislative department have done. We have no other concern." * * *

Although the constitutionality of KRS 91.540 was raised both before the trial Court and the Appellate Court, neither one of them passed upon it or even explained or gave a reason for not doing so. We know not why. We will not speculate. We only know two things: (1) that these questions were raised; (2) that

we could not compel the lower courts to pass on them or even to explain why they failed to do so.

Reply to "Jurisdiction," pp. 8-12 of Respondent's Response.

We have already replied to the "Jurisdiction" in part, and we now address a few remarks to eight Supreme Court cases on pp. 9 and 10 of his response from which the respondent apparently—not actually nor verbatim—quotes. We have carefully read each and every one of those eight opinions. On page 10 he cites *Willoughby* vs. *Chicago*, 235 U.S. 45, 59 L.Ed. 123, and *Cleveland & P. R. Co.* vs. *Cleveland*, 235 U.S. 50, 59 L.Ed. 127; *Missouri Pac. R.R. Co.* vs. *Hanna*, 266 U.S. 184, 69 L.Ed. 235; *Mellon* vs. *O'Neil*, 275 U.S. 242, 72 L.Ed. 245; *White River Lbr. Co.* vs. *Arkansas ex rel Appiegate*, 279 U.S. 692, 73 L.Ed. 903. We respectfully submit that no one of these cases is applicable to the case at bar.

We have also read the case of *People of State of New York, ex rel. Cohn* vs. *Graves*, 300 U.S. 308, 81 L.Ed 666. In that case this Court did grant the petition, but affirmed the New York court in all respects except one, and in that respect this Court held that the case was not properly before it, and we, therefore, respectfully submit that that case has no application to the case at bar. We have also read the rather lengthy opinion of this honorable Court by Judge Brandeis in *Thompson* vs. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 81 L.Ed. 510. The appeal was

granted in that case but this Court affirmed the District Court for the Western District of Texas. We respectfuly submit that that case has no application to the case at bar.

We have also read the case of *Honeyman* vs. *Hanan*, 300 U.S. 14, 81 L.Ed. 476. In that case the appeal was granted and a judgment of the New York court vacated and remanded for further proceedings consistent with this Court's opinion. This Court towards the close of its opinion, 81 L.Ed. at p. 483, said:

> "IN THE EXERCISE OF OUR APPELLATE JURISDICTION WE HAVE POWER NOT ONLY TO CORRECT ERRORS IN THE JUDGMENT UNDER REVIEW BUT TO MAKE SUCH DISPOSITION OF THE CASE AS JUSTICE REQUIRES."

To the same effect see *Patterson* vs. *Alabama*, 294 U.S. 600, 607, 79 L.Ed. 1082, 1085, 55 S.Ct. 575, and *Villa* vs. *Van-Schaick*, 299 U.S. 152, 81 L.Ed. 91, 57 S.Ct. 128.

At this point we respectfully submit that this honorable Court in justice should not only grant this petition, but go further and reverse the lower court.

It will be noted that the respondent puts in quotations what purports to be said in the opinions in those cases. We merely remark that upon a very careful reading of those opinions, we were not able to find a verbatim quotation from anyone except *Cleveland and P. R. Co.* vs. *Cleveland, supra.* We most respectfully submit, therefore, that there is no merit in

respondent's contention that Federal questions were not presented in the lower court and for that reason this Court has no jurisdiction.

Reply to "Petitioner Under Statement of Material Facts, Pages 5-14, Inclusive," Response p. 14.

Under this heading on page 14, respondent says:

> "Petitioner just assumes the Tax Receiver failed to comply with the statutory provisions in the sale of the property at the Tax Sale."

We have already touched upon this, pp. 7-8 above, but for further reply to it we respectfully submit that the affdavits, R. pp. 17-21, R. pp. 48-54, R. pp. 106-108, and petitioner's tendered Answer and Counter-claim, R. pp. 36-37, clearly and unequivocally refute the above statement in respondent's response to the effect that the petitioner is merely assuming that the Tax Receiver failed to comply with the statutory provisions in the sale of this petitioner's property.

Reply to "Life History of Petitioner Does Not Present a Federal Question," Response pp. 14-15.

Under this heading respondent says:

> "None of the objections relied upon by the petitioner for his defense in the Court of Appeals or in this honorable Court were in the record of Trial Court before judgment."

For a reply to this, petitioner merely states that a void judgment may be set aside at any time, and petitioner moved the Court to set aside the void judg-

ment and supported his motions by affidavits containing facts which showed that the judgment was void for two reasons; first, the Court did not have jurisdiction over the subject matter; and second, because it was founded upon an unconstitutional statute, namely, KRS 91.540.

Reply to "Questions Before the Court" and to "So Plain That a Child Can Understand," pp. 16-20. Inclusive of Response.

We call the Court's attention first to the fact that respondent omits KRS 91.470 and he also omits subsections (1) and (2) of KRS 91.480, but that he does quote verbatim subsection (3) of KRS 91.480.

We here call the attention of this honorable Court to the fact that in the cases of *C. C. Brunner* vs. *Louise E. Bell* (Ky.), 290 S.W. 2d 461 and *C. C. Brunner* vs. *Ethel Morgan* (Ky.), 317 S.W. 2d 882, the appellant in each of those cases was the same Mr. C. C. Brunner who is the respondent in this action, and his counsel in this action are the same counsel that represented him in those actions, and they are making the same contentions or arguments before this Court in respect to KRS 91.480 (3) that they made in those cases.

The Court will note that the respondent repeats three times, p. 18, p. 20, and p. 23, the verbatim provision of subsection (3) of KRS 91.480, but omits KRS 91.470 and paragraphs (1) and (2) of 91.480.

The best reply that we can make to this argument of the respondent is to quote what the Court of Appeals of Kentucky said in *Brunner* vs. *Bell*, *supra*, and

in *Brunner* vs. *Morgan*, *supra*. In *Brunner* vs. *Bell*, *supra*, this Court said:

"Brunner purchased, at public sale, a tax bill for unpaid city taxes on the property in question for the year 1950. The appellee failed to redeem the property within the next two years, as permitted by KRS 91.510(1), and a tax deed was thereupon issued to the purchaser of the tax bill, as provided by KRS 91.540. Brunner paid the city taxes for the years 1950, 1951, and 1952.

"In her deposition the appellee said that she attempted to pay the city taxes in 1952, but her money was refused by a clerk at the Tax Receiver's office. She was informed that her taxes had already been paid, but the clerk was unable to tell her who had paid them. She was not informed that a tax bill to her property had been sold, and was not told of her statutory right of redemption.

"The appellee attacked the validity of the tax deed by an allegation that, at the time of the sale of her real estate for unpaid city taxes, she owned personal property, valued at more than one thousand dollars, which could have been levied upon, and which would have more than satisfied the tax claim. Brunner does not dispute that assertion, but relies solely upon his tax deed to support his claim to the property.

"Brunner contends that the trial court's judgment is erroneous due to the provisions of KRS 91.480(3). That statute states in part, " * * * no levy or attempted levy upon personal property shall be necessary to validate any sale of real property, whether for taxes on real property, personal property or both." The provision, lifted

out of context, would seem to sustain his contention; but its real meaning can be obtained only by reading it in conjunction with other related provisions of the statutes.

"KRS 91.470 expressly provides for the sale of personal property for the satisfaction of city taxes. It states in part that ' * * * the tax receiver shall, immediately upon the filing of the lists of unpaid tax bills, distrain the personal property owned or in the rightful possession of the taxpayer, notwithstanding the existence of any lien, except the lien for state taxes, upon the property, and may proceed to sell the title of the taxpayer in a sufficient amount of the property to pay the tax, penalties, interest and costs.' *Following* that provision, KRS 91.480 provides for the sale of real property to satisfy city taxes. Sub-section 1 provides for such sales "If no personal property is reasonably available out of which the tax bill can be collected by distraint * * * "

"(1, 2) When the language of KRS 91.480(3), upon which Brunner relies, is considered in the light of the foregoing sections of the statutes, we think it means that no levy or attempted levy upon personal property is necessary to validate a sale of real property *if such levy or attempted levy would necessarily be futile and useless.* Typical situations where the statute would apply would be where the Tax Receiver knows that no personal property exists, or that existing personalty is exempt from execution, or encumbered previously by superior liens which, in any event, would exhaust its entire value. In such situations, and perhaps others, of course, real property of the delinquent city taxpayer can be sold without first levying or attempting levy on his personal

property. This interpretation is consistent with that which we have applied to earlier statutes treating the same subject. See Taylor v. City of La Grange, 262 Ky. 383, 90 S.W. 2d 357, and Allen v. City of Harrodsburg, 247 Ky. 360, 57 S.W. 2d 45, wherein we held that city tax collecting officers must exhaust personal property of the delinquent before proceeding against his realty.

"(3) In the case before us, it is undisputed that the appellee's personal property could have been levied upon to satisfy fully the City's tax claim against the property. Under these circumstances, the sale of the real property, without first exhausting the available personal property, was contrary to the statutes, as we construe them. We have held consistently that proceedings to sell property for taxes must conform to statutory provisions, and proceedings which fail to do so are void. See Interstate Bond Co. v. Williams, 290 Ky. 850, 162 S.W. 2d 770; Smith v. Isom, 257 Ky. 554, 78 S.W. 2d 752.

"Hence, the deed upon which Brunner relies is void; and the trial court properly quieted the appellee's title to her property.

"The judgment is affirmed."

The opinion in *Brummer* vs. *Morgan, supra,* is very short and we repeat it verbatim as follows:

"This contest involves the title obtained by appellant, C. C. Brunner, to certain real estate situated in Louisville, Jefferson County, Kentucky, under a tax deed. The Chancellor adjudged the deed to be void.

"The sole question presented in whether it is mandatory under KRS 91.470 that a levy be made

upon personal property before the taxpayer's real property may be sold for the collection of taxes.

"Appellee, Ethel Morgan, by uncontradicted proof, showed that she owned personal property out of which the pertinent taxes could have been collected. *No effort was made by the tax collector to discover any personal property upon which to make a levy except an unsuccessful examination of his record.*

"Appellant contends that KRS 91.480(3) renders directory KRS 91.470 and 91.480 (1) (2). The same contention was unsuccessfully made in Brunner v. Bell, Ky., 290 S.W. 2d 461. A full discussion of the statutes and principles involved is contained therein. Brunner v. Bell, supra, is controlling here.

"Judgment affirmed."

Reply to "Additional Points And Authorities" of Respondent's Brief, pp. 21-29, and to "Important Decisions," pp. 21-33 of Response.

Under the heading "Additional Points and Authorities" respondent quotes from four opinions, two from the Court of Appeals of Kentucky, one from Texas, and one from Arkansas. Let us examine them. The first case is that of *Dalton* vs. *State Property and Building Commission* (Ky.), 304 S.W. 2d 342. From that opinion we look into the background of the action.

"The case tests the validity and strength of the foundation of a proposed issue of bonds of the Commonwealth of Kentucky in the aggregate of $100,000,000, the proceeds of which are to be

used to match funds that may be allocated to Kentucky for highway construction by the national government. The proposition was submitted to the voters at the November, 1956 election and resulted in 511,656 votes being casted in favor and 85,635 votes cast against it. * * * The General Assembly at its second extraordinary sesssion, which convened March 9, 1956, passed an act, chapter 3, authorizing the execution, sale and delivery of one hundred million ($100,000,000) Dollars principle amount of Commonwealth of Kentucky bonds, the proceeds from the sale of which will be used to match federal funds for the construction of highways, bridges and tunnels in the Commonwealth of Kentucky, and providing for the submission thereof to the voters at the general election to be held on November 6, 1956. * * *

"Section 4. The heart of the Act, is heavily assailed. It is quoted in part.

> "'Section 4. * * * In order to provide for the payment of the principal of all of said bonds at their maturity and the interest thereon annually as same shall accrue, there shall be levied and collected in each of the thirty years from January 1, 1957, to January 1, 1987, taxes for the benefit of the State Road Fund in the form of license, excise taxes and fees relating to registration, operation and use of vehicles on public highways and excise taxes, use and license taxes relating to gasoline and other motor fuels used upon the public highways in Kentucky * * *!' "

Six sections in Kentucky's constitution, namely, 47, 49, 50, 178, 181, and 230, are mentioned in the opinion. Section 47 states that bills for raising revenue

shall originate in the House. The bill involved originated in the Senate. The Court correctly held that the bill in question was not one for raising revenue and therefore did not violate Section 47 of the constitution of Kentucky. We agree. The Court held that the act in question specified the purpose for which the debt (bonds) was to be created and was not in violation of Section 49 of the Kentucky Constitution. We believe the Court was correct. The chief controversy arose out of the language of Section 50 of Kentucky's constitution which says in part, quoting from the opinion, p. 347:

> "Section 50 of the Constitution, quoted above, declares that no contract shall be made or debt incurred by the States 'unless provision be made in the Act of the General Assembly 'to levy and collect an annual tax sufficient' to pay interest upon and discharge the debt within thirty years."

Now, the act in question did not embody the exact words "levy and collect an annual tax" but did say what we have just quoted above from Section 4 of the act. In concluding that Section 50 of the constitution of Kentucky was not violated the Court, among other things, said:

> "Of course, motor vehicles and such taxes here made applicable to the payment of the debt were unknown when the Constitution was adopted." * * * "Though the registration and licenses may be collected annually, the motor fuel and sale excises are daily taxes." * * *
>
> * * * * In all the circumstances, we reach the conclusion that the pledge and commitment of

> the Act is to provide a tax in each of the thirty years as may be deemed annually sufficient to pay annual and other timely requirements of the bond issue, and that this is a substantial compliance with 350 of the Constitution."

We agree with the Court that the act in question did not violate Sections 47, 49, 50, 178, 181 or 230 of Kentucky Constitution, but we vigorously maintain that that opinion does not in the slightest degree support respondent's contention that said opinion upholds the constitutionality of KRS 91.540. In that opinion the Court said:

> "This judicial position of saving legislation if possible is rooted in the doctrine that a state constitution is not a grant of power but is a limitation on the power of the Legislature and that that department of government posseses and may exercise within constitutional limits all legislative powers as it sees fit. It may enact any law not expressly or impliedly prohibited by the Constitution of the state or the nation."

The Court will note that the legislature must act within constitutional limits, but it may not enact legislation prohibited by the constitution of the state or nation. It is petitioner's most earnest contention that KRS 91.540 violates Sections, 2, 26, 27, 59(12), and 109 of the Constitution of Kentucky, and that it clearly violates paragraph 1 of the Fourteenth Amendment to the Constitution of the United States. We shall under Part II develop these ideas more fully, but at this point we maintain that said section of the statute

violates Section 27 of the Constitution of the State of Kentucky in that it vests in the Tax Receiver (a ministerial officer) both executive powers and judicial powers in that it vests in him (1) the power and authority to be the sole judge of his own acts, that is, whether or not in the sale of the property for taxes he has complied with the mandatory statutory provisions of KRS 91.470 and 91.489(1)(2); (2) it authorizes said Tax Receiver to convey the fee simple title of the taxpayer's property without giving said taxpayer any kind of hearing, judicial or otherwise, to determine whether said Tax Receiver, in the sale of said taxpayer's property complied with the mandatory provisions of the aforesaid statutes. Such power and authority in the Tax Receiver is nothing short of taking taxpayer's property without due process of law. KRS 91.540 violates 109 of the Kentucky Constitution for the same reasons. It most certainly and definitely violates Section 2 of the Constitution of Kentucky for it vests in the Tax Receiver, a ministerial officer, the "absolute and arbitrary power" over taxpayer's Property to confiscate—to convey the fee simple title without giving taxpayer an opportunity to be heard as to whether or not in the sale the mandatory provisions of the aforesaid statutes have been complied with, which certainly amounts to a taking of the taxpayer's property without due process of law.

Respondent further quotes from the Dalton opinion, *supra* as follows:

> "Indeed, the presumption is that a proviso in a statute refers only to the provision to which it

is attached, and, as a general rule, a proviso is deemed to apply only to the immediate preceding clause or provision."

Then some comments, and quotes again in full (3) of KRS 91.480, contending as he did in *Brunner* vs. *Bell*, and in *Brunner* vs. *Morgan*, *supra*, that (3) of KRS (3) of KRS 91.480 is controlling, but neither (3) of KRS 91.480 nor the last sentence of KRS 91.540, "the deed shall be prima facie evidence of the regularity of the sale, of all prior proceedings, and of title in the purchaser to whom the deed is executed," can cure the unconstitutionality of KRS 91.540. Said section 91.540 is contrary to sections 2, 26, 27, 59(12) and 109 of the Kentucky Constitution. We shall only mention two reasons here, first, because it vests in the Tax Receiver both executive and judicial powers contrary to section 27 of the Constitution, and it gives him an absolute and arbitrary power over the property of freemen. Hence, without due process of law.

We have not read the case of *Sheffield* against the *State of Texas*, 307 S.W. 100, cited on page 23 of respondent's response, but reading what is quoted, we respectfully submit that that case has no bearing upon the case at bar.

We have carefully read the case of *Bedinger* vs. *Graybill's Executor and Trustee*, 302 S.W. 2d 594. The question involved in that case was one of construction of the adoption statute as to whether or not it was against public policy. We are unable to see that it has any bearing on the case at bar. There was no constitutional question involved. The Arkansas

case of *Leonard* vs. *Thompson*, 306 S.W. 2d 869, is not applicable because there was a foreclosure sale in that case—none in the case at bar. Respondent on pages 26 and 27, says:

> "KRS 91.470 provides for the collection of taxes; that the tax receiver shall restrain the personal property of the taxpayer if any to be found owned or rightfully in the possessions of the taxpayer, to satisfy the taxes, but this section makes no direct provision for the collection of taxes on real property. It apparently referred to and was for the purpose of providing the means for the collection of personal property taxes. The record in this case clearly demonstrates the fact that the taxpayer not only did not have any personal property upon which the tax receiver might levy or distrain, but that he had never listed any personal property upon which the tax receiver might levy or distrain, but that he had never listed any personal property for tax purpose as required by law. KRS 91.480 provides the procedure that the tax receiver shall pursue for the collection of taxes due and unpaid upon real property in the City of Louisville and that sub-section 3 of said Statute in no uncertain terms states that:
>
> "'No levy or attempted levy upon personal property shall be necessary to validate any sale of real property whether for taxes on real property, personal property or both.'"

We respectfully submit that the above statement is answered in *Brunner* vs. *Bell*, *supra*, and *Brunner* vs. *Morgan*, *supra*, and by this Record. *It is really amazing how careless respondent is in reference to the uncontradicted and undisputed fact, contained in*

and shown by the record, namely, that petitioner had, at the time his property herein was sold, more than ample personal property to satisfy the taxes on said real estate involved herein. And furthermore, there is no proof whatsoever in this record that petitioner did not list personal property for taxes.

We now pass to the case of *Drane* vs. *Graves*, 261 Ky. 787, 88 S.W. 2d 927 in which respondent contends that the court carefully construed the sections of Kentucky Revised Statutes in question. First of all we call the Court's attention to the fact that that was a suit for damages, secondly, that the court was not necessarily called upon to construe the statutes mentioned nor was the question of the constitutionality of any one of them raised. The truth of the matter is that what is quoted by respondent is in reality mere dictum.

PART II

ENLARGEMENT OF ARGUMENT SHOWING THAT KENTUCKY REVISED STATUTE SEC. 91.540 IS UNCONSTITUTIONAL IN THAT IT TOOK PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO BOTH KENTUCKY AND UNITED STATES CONSTITUTIONS.

The present Constitution of the State of Kentucky was adopted on September 18, 1891. The source of sections 2, 26, 27, 59(12) and of 109 of the present Constitution of the State of Kentucky is derived from the Constitution of the State of Kentucky of 1850.

Sections 1-25 of the present Constitution of the State of Kentucky are known as the Bill of Rights.

Section 2 is as follows:

"Sec. 2. Absolute power does not exist in a republic.—Absolute and arbitary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Section 26 reads in part as follows:

"Sec. 26. Bill of rights to remain inviolate.—* * * and all laws contrary thereto, or contrary to this Constitution, shall be void."

Section 27 reads as follows:

"Sec. 27. Legislative, executive, and judicial departments.—The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Section 59 reads as follows:

"Sec. 59. Limitations upon.-The general assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:

* * * 12. LEGALIZING INVALID INSTRUMENTS, TO GIVE EFFECT TO INVALID DEEDS, WILLS OR OTHER INSTRUMENTS."

Section 109 is in part as follows:

> "Sec. 109. Consists of senate, court of appeals and inferior courts.-The judicial power of the Commonwealth both as to matters of law and equity, shall be vested in * * * and one supreme court (to be styled the court of appeals) and the courts established by this Constitution."

The first paragraph of the Fourteenth Amendment to the Constitution of the United States applies to the power of the state legislature, and, as we have heretofore pointed out, we most respectfully insist that KRS 91.540 is contrary to the above section of the Fourteenth Amendment, Constitution of the United States, as well as contrary to the intent and purpose of the whole federal constitution in that (1) it vests in the city tax receiver an arbitrary power and authority to deprive without a hearing—without due process of law—a delinquent taxpayer of his property; (2) it invests the city tax receiver with judicial power and authority to determine without a hearing or even a hope to be heard whether or not he has sold the taxpayer's property according to the mandatory provisions of the Kentucky statute thereby depriving the taxpayer of his property without due process of law.

In this connection we desire to call the Court's attention to three of their comparatively recent cases; namely, *Morgan, et al.* vs. *U. S., et al.*, 304 U.S. 182, L. Ed. 1129, 58 S.Ct. 773, *Joint Anti-Fascist Refugee Committee* vs. *McGrath, Attorney General of the U.S., et al.*, 341 U.S. 123, 95 L.Ed. 817, and *Gonzales* vs. *U.S.*, 348 U.S. 407, 75 S.Ct. 409. Each of these cases involved the very vital question of the power and authority of

an executive or administrative office or agency to enforce executive orders and regulations issued presumably under statutory authority without giving an opportunity for a hearing. We respectfully invite the court to consider the principles of law set down by it in those cases. In *Joint Anti-Fascist Refugee Committee* vs. *McGrath, Attorney General of the United States, supra*, among other things, this court said:

> "'The construction placed by this Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning.
>
> "'The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.'"

The Court of Appeals of Kentucky in *Williams* vs. *Wedding, Judge*, 165 Ky. 361, 176 S.W. 1176, held that the provisions of a drainage act depriving the property owner of remedy against the action of the Board of Commissioners, was in conflict with Section 2 of the Kentucky Constitution. In *Slaughter* vs. *Post*, 214 Ky. 175, 28 S.W. 1091 the Court of Appeals of

Kentucky held that an ordinance conferring on the city council power at their discretion to grant or refuse permits for gasoline filling stations, was void contrary to Section 2 of the Kentucky statutes. In *Colyer* vs. *The City of Somerset*, 306 Ky. 797, 208 S.W. 2d 976, the Court of Appeals of Kentucky held that an ordinance giving the city officials power to designate the distance that a building must be set back from the sidewalk in granting building permits, was unconstitutional as against Section 2 of the Constitution of Kentucky.

We have hereinabove and heretofore repeatedly stated that KRS 91.540 combines in a ministerial or administrative officer both judicial and executive powers contrary to Section 27 of the Kentucky Constitution and contrary to 109 of the Kentucky Constitution.

The Court of Appeals of Kentucky, since 1876, has consistently and repeatedly held that a tax deed is void where the provisions of the statute in the sale of the property are not strictly complied with. See *Phillips* vs. *Bannister*, 9 Ky. Opin. 588 (year 1876). *Lamb* vs. *Leach*, 12 Ky. Opin. 237 (year 1883). *Wheeler* vs. *Bramble*, 8 S.W. 199, 10 Ky. Law Rep. 301 (year 1888). And so on down to the present time. Yet in the face of a long line of opinions for nearly 100 years to the present time of the highest court of the State of Kentucky, the legislature has in KRS 91.540 given or granted to the city tax receiver the power and authority "to give effect to invalid deeds"

contrary to Section 59 (12) of the Constitution of the State of Kentucky.

CONCLUSION

Doubtless the framers of our federal constitution were able, patriotic men, men who were profound students of history, of government, of politics, of laws and civil codes, and of human nature. The framers of the Kentucky Constitution of 1891 were doubtless men of the same caliber.

From time immemorial it appears from history, literature, codes of laws and of nations and governments that have come and gone and that now exist, that there are, generally speaking, two philosophies or theories as to the purpose, nature and existence of civil government among men. One is that men, peoples, exist for the government or for those who exercise authority; that people exist for the state. This philosophy or theory excludes and denies to men their inalienable rights, especially the inalienable right to own and possess real estate, property. The other philosophy or theory of government is that government exists for men. In other words, among the most vital purposes for the existence of government is to protect the inalienable rights of the individual man among which is the right to own and possess property which he cannot be deprived of without due process of law, that is, a hearing. This theory of government is embodied in the last words of Lincoln in his famous Gettysburg address:

"AND THAT GOVERNMENT OF THE PEOPLE, BY THE PEOPLE, FOR THE PEOPLE, SHALL NOT PERISH FROM THE EARTH."

The above mentioned theories or philosphies of the purpose of civil government exist in the world today. The people of the State of Kentucky and of the United States of America believe in and hold to the latter theory.

The framers of our federal Constitution and of Kentucky's constitution, doubtless keenly realized that to maintain the inalienable rights of men, among which was and is the right to own and hold property, that among other factors, at least two fundamental principles of government should be embodied in the law—the constitutions—of the land. One, the separation of powers, executive, legislative and judicial. They were well aware of the grievous abuse of power where these separate functions of government were all combined in one or more persons. The other fundamental principle or inalienable right is that men were not to be deprived of their property by arbitrary methods, by seizure or confiscation, that is without due process of law, without a hearing, judicial hearing, of the facts as to whether or not a right, even for taxation, exists to take one's property.

In *Miller, Collector* vs. *Standard Nut Margarine Co. of Florida*, 284 U.S. 498, 52 S. Ct. 260-76 L. Ed. 422; *United States* vs. *Merriam*, 263 U.S. 179, 188, 44 S. Ct. 69, 68 L. Ed. 240, 29 A.L.R. 1547; *Bowers* vs.

N. Y. & Albany Co., 273 U.S. 346, 350, 47 S. Ct. 389, 71 L. Ed. 676, and many other cases, THIS COURT HAS HELD THAT IT IS ELEMENTARY THAT TAX LAWS ARE TO BE INTERPRETED LIBERALLY IN FAVOR OF TAXPAYERS, DOUBTS MUST BE RESOLVED AGAINST THE GOVERNMENT AND IN FAVOR OF TAXPAYERS.

Again we quote from an address of Abraham Lincoln on January 27, 1838, before the Young Men's Lyceum of Springfield, Illinois. He was speaking of dangers that might overthrow or destroy our government. Among other things, he said:

> "At what point then is the approach of danger to be expected? I answer, if it ever reach us, it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide."

Among the most potent factors in the downfall of all governments that have come and gone is the abuse of taxing power. We do not say this lightly. It is within the provisions of this honorable Court to curb the present tendency in this country to confine executive and judicial powers in tax matters in one person, a ministerial person or executive officer, without giving the taxpayer an opportunity to be heard. For reasons set forth in his original petition and hereinabove set forth, it is most respectfully submitted that in plain, simple justice, petitioner's

petition for a Writ should not only be granted, but that the judgment of the lower court should be reversed.

Respectfully submitted.

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